Supreme Court, U.S.
FILED

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No. —

In the
Supreme Court of the United States

Pravin D. Patel; Aruna P. Patel; Sanjay Patel; Harivandan P. Patel; Hansa Patel; Amrut N. Patel; Sita Patel; Jayesh Patel; Suresh Patel; Mahesh Patel; Bhavabhai Patel; Vibhakar B. Patel; Mahendra Patel; Vimalaben V. Patel; Markan Thakar; Chandravadan K.P. Shastri; Pushpa C. Shastri; Vijay K. Shastri; Bhagwatiben V. Shastri; Rajendra Shastri; Anita Shastri,

Petitioners,

v.

City of San Bernardino, a Municipal Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A PARTY MAY OBTAIN RETROSPECTIVE DAMAGES UNDER 42 U.S.C. § 1983 IN FEDERAL COURT FOR A MUNICIPAL TAX THAT HAS ALREADY BEEN DECLARED INVALID IN STATE COURT UNDER THE FEDERAL DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WITHOUT BAR TO THE SUIT BY THE TAX INJUNCTION ACT, 28U.S.C. § 1341?

RULE 14.1 (b) STATEMENT

Plaintiffs-Appellants and Petitioners: Pravin D. Patel, Aruna Patel, Sanjay Patel, Harivandan P. Patel, Hansa Patel, Amrut N. Patel, Sita Patel, Jayesh Patel, Suresh Patel, Mahesh Patel, Bhavabhai Patel, Vibhakar B. Patel, Mahendra Patel, Vimalaben V. Patel, Markan Thakar, Chandravadan K.P. Shastri, Pushpa C. Shastri, Vijay K. Shastri, Bhagwatiben v. Shastri, Rajendra Shastri, Anita Shastri.

Defendant-Appellee and Respondent: City of San Bernardino, a Municipal Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pravin D. Patel, Aruna Patel, Sanjay Patel, Harivandan P. Patel, Hansa Patel, Amrut N. Patel, Sita Patel, Jayesh Patel, Suresh Patel, Mahesh Patel, Bhavabhai Patel, Vibhakar B. Patel, Mahendra Patel, Vimalaben V. Patel, Markan Thakar, Chandravadan K.P. Shastri, Pushpa C. Shastri, Vijay K. Shastri, Bhagwatiben V. Shastri, Rajendra Shastri, Anita Shastri ("Petitioners") respectfully petition for a writ of certiorari to review the memorandum decision and judgment of the U.S. Court of Appeals for the Ninth Circuit filed November 9, 2006 and the opinion filed November 13, 2002.

OPINIONS BELOW

The Memorandum Decision of the U.S. Court of Appeals for the Ninth Circuit, dated November 9, 2006, is unofficially reported at 2006 U.S. App. Lexis 28015, and is reproduced at App. A, 1a-2a.

The Order of the U.S. District Court for the Central District of California, dated September 24, 2005, is reproduced at App. B, 3a-12a.

The Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated November 13, 2002, is officially reported at 310 F.3d 1138, and is reproduced at App. C, 13a-22a.

The Order of the U.S. District Court for the Central District of California, dated January 25, 2001, is reproduced at App. C, 23a-36a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on November 9, 2006. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Furthermore, the Court has jurisdiction to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeal. *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964).

Thus, petitioners request review of the opinion of the U.S. Court of Appeals for the Ninth Circuit that was entered on November 13, 2002.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1341 states in pertinent part:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Section 1 of the Klu Klux Klan Act of 1871, Rev. Stat. 1979, as amended, 42 U.S.C. § 1983 provides:

> "Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT OF THE CASE

The petitioners Pravin D. Patel are owners and operators of hotels or motels in the City of San Bernardino ("City"). The City imposed a "transient occupancy tax" ("TOT") on certain hotel guests, and the petitioners were required to collect this tax from their customers and remit it to the City. In 1991, the petitioners filed a complaint in state court for declaratory and injunctive relief under state law, asserting that the ordinance was unconstitutionally vague on its face. App. 14a.

In 1997, the California Court of Appeal agreed and held that the tax violated the Due Process Clause of the federal constitution. App. 14a. *See City of San Bernardino Hotel/Motel Ass'n v. City of San Bernardino*, 59 Cal.App.4th 237, 69 Cal.Rptr.2d 97, 101-04 (Cal. Ct. App. 1997).[1] However, the court of appeal denied injunctive relief and noted that the City could amend the tax ordinance to cure its infirmities. *See* 69 Cal.Rptr.2d at 104. App. 14a.

Meanwhile, the City passed a new ordinance that replaced the old TOT with a new "transient lodging tax," that the City voters approved on February 3, 1996. App. 14a.

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[1] All of the petitioners and plaintiffs in the instant action are members of the City of San Bernardino Hotel/Motel Ass'n and were members during the course of the prior litigation before the California courts. App. 25a.

The former ordinance became ineffective on February 3, 1998 when the California Supreme Court denied the City's petition for review of the California Court of Appeal's decision invalidating the ordinance. App. 2a.

Petitioners then filed suit in federal district court, claiming damages under 42 U.S.C. § 1983 and state law for being required to expend their time and services to collect and account for an illegal tax. App. 15a, 18a, n. 2.

The district court dismissed the complaint for lack of jurisdiction under *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed. 2d 271 (1981). App. 5a, 15a, 29a-35a.

The petitioners appealed, and the Ninth Circuit in a published opinion, affirmed in part, reversed in part, and remanded the case to the district court. App. 5a, 13a-22a. *Patel v. City of San Bernardino*, 310 F.3d 1138, 1142 (9th Cir. 2002).

In particular, the Ninth Circuit reversed the district court's dismissal of the complaint in part and held that on remand, petitioners could only pursue remedies under 42 U.S.C. § 1983 for any damages that accrued after the state courts overturned the tax. App. 5a, 20a-21a.

The Ninth Circuit found that by the state court declining to award injunctive relief after the tax was declared unconstitutional, petitioners were denied a "plain, speedy and efficient," remedy under the Tax Injunction Act, 28 U.S.C. § 1341. App. 19a-21a.

The Ninth Circuit denied petitioners the right to seek retrospective relief under 42 U.S.C. § 1983 prior to the state

courts overturning the tax, finding that a party may not proceed under § 1983 so long as a "plain, speedy and efficient," remedy is available in state court, even though petitioners had brought this suit after the tax was overturned. App. 15a-19a.

On remand, the City moved for summary judgment in the district court, contending that they had not collected the old TOT after the state court of appeal opinion became final. The district court granted summary judgment in favor of the City on all of petitioners' claims, including the § 1983 claim, and in an unpublished memorandum decision, the Ninth Circuit affirmed. App. 1a-2a, 3a-12a.[2] [3]

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[2] Petitioners contended that the court of appeal decision became final on February 9, 1998, after the remittitur issued in the case and that City continued to collect the old TOT until June 30, 1998 when the new TOT became effective. App. 4a, 11a and 14a.

The Ninth Circuit held that the state court of appeal opinion invalidating the old TOT became final and was ineffective on February 3, 1998 when the California Supreme Court denied the City's petition for review, and thus, the former ordinance was invalidated less than twenty-four hours before the new ordinance took effect. App. 2a.

The question of the City's collection of the old TOT after the court of appeal became final, is no longer in contention.

[3] On appeal to the Ninth Circuit, petitioners urged the court to overturn the Ninth Circuit's previous opinion that limited federal court jurisdiction under the Tax Injunction Act, and cited this Court's decision in *Hibbs v. Winn*, 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) as intervening authority permitting the Ninth Circuit to do so. App. 2a.

REASONS FOR GRANTING THE PETITION

I. NEITHER THE TAX INJUNCTION ACT NOR PRINCIPLES OF FEDERALISM AND COMITY BAR A § 1983 SUIT FOR DAMAGES AFTER A STATE TAX SYSTEM HAS BEEN DECLARED INVALID AND HALTED.

In the Ninth Circuit's published opinion ("*Patel I*"), it stated that "we are aware of of no case which reaches the narrow question here: whether a party who has obtained a declaration in state court that a tax is invalid may then obtain a remedy [for retrospective relief] under § 1983 in federal court. App. C, 16a.

The Court has never decided the narrow issue presented here and *Fair Assessment* appears to authorize petitioners' position that they may seek such relief.

In *Fair Assessment*, after the Court explained the background principles of comity and equitable restraint that preceded the enactment of the Tax Injunction Act, the Court rejected the argument that damages actions are inherently less disruptive of state tax systems than injunctions or declaratory judgments. *Fair Assessment*, 454 U.S. at 113, 102 S.Ct. at 184.

The Court held that allowing petitioners to recover damages under § 1983 would first require a district court to declare and determine the unconstitutionality of a state tax scheme and would be fully as intrusive as the equitable actions that are barred by principles of comity. *Fair Assessment*, 454 U.S. at 113, 102 S.Ct. at 184-185.

In finding that a damages action under § 1983 would be fully as intrusive as the equitable actions barred by the Court's previous decisions, the Court concluded that " [t]he recovery of damages under the Civil Rights Act first requires a 'declaration' or determination of the unconstitutionality of a state tax scheme that would halt its operation." *Fair Assessment*, 454 U.S. at 115, 102 S.Ct. at 186 (emphasis added).[4]

This case presents precisely the issue stated in *Fair Assessment* since petitioners first obtained a declaration and determination of the unconstitutionality of a state tax scheme that halted the operation of the City's tax. App. 16a.

The Court has also left open the possibility that a § 1983 suit could proceed if it "requires no scrutiny whatever of state tax assessment practices," a situation presented in the case at bar where the petitioners first obtained a declaration and determination of the unconstitutionality of the City's tax scheme. *Fair Assessment*, 454 U.S. at 107 n. 4, 102 S.Ct. at 177.

In *Fair Assessment*, the Court was concerned that allowing actions under § 1983 would be particularly intrusive given the absence of any need to exhaust state remedies. *Fair Assessment*, 454 U.S. at 113-14, 102 S.Ct. at 185.

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[4] The same principle applies to a § 1983 action in state court. *See National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 589, 115 S.Ct. 2351, 2356, 132 L.Ed.2d 509 (1995) ("[j]ust as *Fair Assessment* relied upon a background principle [of comity] in interpreting § 1983 to preclude damages actions in federal court, so we rely on the same principle in interpreting § 1983 to provide no basis for courts to award injunctive relief when an adequate legal remedy exists.").

As the Ninth Circuit recognized, "that concern is not present here, where the plaintiffs first raised their claims in state court and successfully persuaded those courts that the tax was unconstitutional." App. 17a.

While *Patel I* found that this suit is considerably less intrusive than the suit in *Fair Assessment*, where the federal court would have been required to determine the validity of the tax before awarding damages, it further found that allowing a retrospective application of this § 1983 suit would significantly intrude into the smooth functioning of the city's tax system, and that based on principles of comity, it was barred, since before a federal court awarded damages it would have to determine whether petitioners suffered cognizable injury and the extent of that injury. App. 18a.

Patel I, further held that allowing damages under § 1983 could expose cities and states to substantial tort liability, above and beyond any refund claims by the actual taxpayers. App. 18a.

These concerns have no precedential mooring in this Court's decisions regarding principles of federalism and comity that animate the TIA. Determining whether petitioners suffered cognizable injury and the extent of that injury and the extent of damages are no more than the normal considerations in any § 1983 suit, and have no significance with regard to the policy concerns underlying the TIA of federal interference with state tax administration.

Once a state tax regime has been declared invalid and halted, issues of federal intrusion are no longer at issue since a § 1983 suit for damages would not require a district court to scrutinize a state tax assessment scheme.

This Court's more recent authority in *Hibbs v. Winn*, 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) also undermines the decision in *Patel I* and the subsuequent memorandum decision by the Ninth Circuit ("*Patel II*").

In *Hibbs*, the Court affirmed the Ninth Circuit's reversal of a district court dismissal of an action under 28 U.S.C. § 1341 that brought by Arizona taxpayers challenging the consitutionality of Arizona's statute permitting tax credits for contributions supporting parochial schools, as violating the Establishment Clause.

In *Hibbs*, the Court explained that:

> "[T]he Act [28 U.S.C. § 1341] had two closely related, state protective objectives: (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court - usually out-of-state-corporations asserting diversity jurisdiction - and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Id.*, 124 S.Ct. at 2287.

These twin state-revenue protective objectives are not implicated here because the petitioners have already invalidated the previous tax system and seek third party tort damages, not refunds for taxes already collected. App. 18a, n.2.

After *Hibbs*, the dispositive question in determining whether the jurisdictional bar under the TIA is whether federal-court relief would have operated to reduce the flow of

state tax revenue. That is not the case here where the previous tax system has been abandoned by the City and a new system has been adopted in its place.

In *Hibbs*, the Court explicitly held that "[t]hird party suits not seeking to stop the collection (or contest the validity) of a tax imposed on plaintiffs, were outside Congress' purview." *Hibbs*, 124 S.Ct. at 2287.

This action is precisely the type of third party suit that does not seek to stop the collection, or contest the validity of the City's former tax, and is simply outside the concerns of the TIA.

As the Court concluded in *Hibbs*:

> "In sum, this Court has interpreted and applied the TIA [28 U.S.C. § 1341] only in cases Congress wrote the Act to address, i.e. cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Hibbs*, 124 S.Ct. at 2289.

Third party suits such as this one which fall outside Congress' purview, as *Hibbs* now clarifies, do not fall within the scope of the TIA, and there is simply no jurisdictional bar or comity concerns that are implicated.

In sum, there is no jurisdictional bar or comity concerns that bar retrospective application of petitioners' § 1983 suit.

Despite the petitioners extraordinary path to this Court, they have never asked for anything more than what was promised by the guarantees of 42 U.S.C. § 1983.

By first invoking the state action, petitioners scrupulously followed the holding of *Fair Assessment*, yet find themselves without a being able to seek a complete federal remedy under § 1983.

Once the district court obtained subject matter jurisdiction over petitioners' constitutional claims, it had a "virtually unflagging obligation" to exercise jurisdiction and the federal courts should exercise judicial authority over such claims to the full extent of relief permitted under § 1983. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976) (Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them.").

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted under Rule 10(c) as it presents an important and substantial federal question of national interest decided by a circuit court but that has never been decided by this Court.

Respectfully submitted,

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Dated: February 7, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-56839

[Filed November 9, 2006]

PRAVIN D. PATEL; et al.,	)
Plaintiffs - Appellants,	)
	)
v.	)
	)
CITY OF SAN BERNARDINO,	)
a municipal corporation,	)
Defendant - Appellee.	)
	)

MEMORANDUM*

Pravin D. Patel and twenty other named plaintiffs bring this suit against the city of San Bernardino, California ("the City") for damages stemming from the City's alleged collection of an unlawful transient occupancy tax. District Judge Timlin granted summary judgment in favor of the City.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Plaintiffs appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

The parties dispute (1) when the decision invalidating the former ordinance was final and (2) when the new ordinance went into effect. The former ordinance became ineffective on February 3, 1998 when the California Supreme Court denied the City's petition for review of the California Court of Appeal's decision invalidating the ordinance. *See* Cal. R. Ct. 29.4(b)(2). The new ordinance went into effect on February 4, 1998. *See* Cal. Const. art. II, § 10(a) (stating that a voter initiative goes into effect the day after it is approved by the electorate unless the initiative itself instructs otherwise). Thus, the former ordinance was invalidated less than twenty-four hours before the new ordinance took effect.

Appellants also urge the court to overturn an earlier Ninth Circuit opinion in this case that limited federal jurisdiction based on the Tax Injunction Act: *Patel v. City of San Bernardino (Patel I)*, 310 F.3d 1138 (9th Cir. 2002). We only overturn a decision of an earlier panel where there has been an intervening Supreme Court case overruling or undermining the earlier decision. *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992). Appellants argue that *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004), does precisely that. We disagree. *Hibbs* reinforced the Tax Injunction Act's bar of federal suits related to state tax collection where there is an adequate state remedy. Thus, the *Hibbs* holding does not undermine or overrule *Patel I*, which limited the current case to pursuing federal remedies only where the state remedies proved inadequate.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ED CV 98-298 RT (SGLx)

[Filed September 24, 2004]

PRAVIN D. PATEL; et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF SAN BERNARDINO, et al.,	)
Defendants.	)
	)

ORDER GRANTING DEFENDANT
CITY OF SAN BERNARDINO'S
MOTION FOR SUMMARY JUDGMENT

The court, Judge Robert J Timlin, has read and considered defendant City of San Bernardino ("City")'s motion for summary judgment, pursuant to Fed R Civ P 56, plaintiffs Pravin Patel, Aruna Patel, Harivandan Patel, Hansa Patel, Amrut Patel, Sita Patel, Jayesh Patel, Suresh Patel, Mahesh Patel, Bhavabhai Patel, Mahedra Patel, Vibhakar Patel, Vimalaben Patel, Markan Thakar, Chandravadan Shastri, Pushpa Shastri, Vijay Shastri, Bhagwativen Shastri, Rajendra Shastri, and Anita Shastri (collectively,

"Plaintiffs")' opposition, and City's reply. Based on such consideration, the court concludes as follows.

I.

BACKGROUND

The plaintiffs are owners and operators of hotels or motels in the City. The City imposed a "transient occupancy tax" ("TOT") on certain hotel guests, and the plaintiffs were required to collect this tax from their customers and remit it to the City. In 1991, the plaintiffs filed a complaint in state court for declaratory and injunctive relief under state law, asserting that the ordinance imposing the TOT was unconstitutionally vague on its face.

In 1997, the California Court of Appeal agreed and held that the tax violated the Due Process Clause of the federal constitution. *See City of San Bernardino Hotel/Motel Ass'n v. City of San Bernardino*, 59 Cal App 4th 237 (4th Dist 1997) (state court case). However, the court denied injunctive relied and noted that the City could amend the TOT ordinance to cure its infirmities. *Id.* That decision became final on February 9, 1998, shortly after the California Supreme Court denied discretionary review of the state appellate court's decision. Meanwhile, on November 17, 1997 the city passed an ordinance that replaced the old TOT with a new "transient lodging tax" ("TLT"). City voters approved that ordinance ("amended tax ordinance") on February 3, 1998.

The plaintiffs filed a first amended complaint ("FAC") against the City in federal district court, claiming $1 million in damages under 1) 42 USC § 1983 (§1983), and 2) Cal Const Art I, §19. This court dismissed the FAC for lack of

jurisdiction under *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U S 100, 102 S Ct 177 (1981).

The plaintiffs appealed, and the Ninth Circuit affirmed in part, reversed in part, and remanded the case *Patel v City of San Bernardino*, 310 F3d 1138, 1142 (9th Cir. 2002). In particular, the Ninth Circuit reversed the district court's dismissal of the complaint in part and held that the plaintiffs could pursue remedies under 42 USC § 1983 for any damages that accrued after the state courts overturned the tax.[1]

II.

UNCONTROVERTED MATERIAL FACTS

Following are uncontroverted material facts supported by admissible evidence.

The City imposes a TOT on residents of hotels and motels. In a lawsuit filed in state court, the trial court found the City's TOT ordinance to be valid, but the court of appeals found the definitions in the ordinance defining the persons to whom it applied too vague, and in a published opinion held the TOT ordinance invalid as a result. The City sought review of the decision of the Court of Appeals by the California Supreme Court. The California Supreme Court denied review on February 3, 1998.

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[1] In footnote 5 of the *Patel* Opinion the Ninth Circuit noted that the Plaintiff stated at oral argument they were seeking damages under a "theft of services" theory - that the City required them to expend their time and effort to collect and account for an illegal tax.

In November 1997 the City enacted the amended tax ordinance as the "Transient Lodging Tax Ordinance". Since the amended tax ordinance addressed a tax, it was required to be approved by the voters and was placed on the February 3, 1998 ballot. The voters approved the amended tax ordinance, designated as Measure W on the ballot, at the election on February 3, 1998. The amended tax ordinance revised the TOT ordinance to address the ambiguity concerns expressed by the State Court of Appeal. The remittitur in the state court case was filed on February 9, 1998.

III.

ANALYSIS

A Legal Standard for Summary Judgment Motions

Under Federal Rule of Civil Procedure 56 ("Rule 56") a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed R Civ P 56(c).

The Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial'" *T W Elec Serv, Inc v. Pac Elec Contractors Ass'n*, 809 F.2d 626, 630

(9th Cir 1987) (*quoting* Fed R Civ P 56(c), and *citing Kaiser Cement Corp v. Fischbach & Moore, Inc.*, 793 F2d 1100 (9th Cir 1986), and *Celotex Corp v. Catrett*, 477 U S 317, 106 S Ct 2548 (1986)). With respect to the specific facts offered by the nonmoving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in the light most favorable to the nonmoving party. *See T W Elec Serv*, 809 F2d at 630-31 (*citing Matsushita Elec Indus Co v. Zenith Radio Corp*. 475 US 574, 106 S Ct 1348 (1986)).

Rule 56(c) requires entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" *Celotex*, 477 US at 322, 106 S Ct at 2553. In order to defeat a motion for summary judgment, the plaintiff must present significant probative evidence tending to support the complaint. *See Rand v. Rowland*, 154 F3d 952, 963 (9th Cir 1998), *T W Elec Serv*, 809 F2d at 630. The mere existence of a scintilla of evidence in support of the nonmoving party's position is insufficient. "[T]here must be evidence on which the jury could reasonably find for the [nonmoving party]" *Anderson v. Liberty Lobby, Inc*, 477 US 242, 252, 106 S Ct 2505, 2512 (1986). This court thus applies to either party's motion for summary judgment the same standard as for a motion for directed verdict. "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*.

B Discussion

In the instant case, both the § 1983 claim and state law claim are based upon Plaintiffs' contention that the City caused them to collect an illegal tax during the period from the time the TOT ordinance had been declared invalid on February 9, 1998, until the amended tax ordinance became effective on June 30, 1998. The City contends that the tax collections by Plaintiffs that occurred between February 9, 1998 and June 30, 1998 were legal, because the amended tax ordinance became effective on February 4, 1998, the day after at was approved by the voters. The issue central to both the §1983 and state law claim, and therefore the instant motion, is whether the amended tax ordinance became effective on February 4, 1998 or June 30, 1998.

Plaintiffs, in support of their opposition to the motion for summary judgment, present two pieces of documentary evidence which they contend create a triable issue of fact as to the effective date of the amended tax ordinance.[2] On the copy of the full text of the amended tax ordinance that was on file with the City Clerk on March 17, 1998, the following was typed at the top of the page "Effective June 30, 1998." In addition, it is stated in the section of the ballot featuring an analysis by the City Attorney of Measure W, the amended tax ordinance

> A "no" vote would reject the measure and would mean that the City's expected revenue for the fiscal year beginning July 1, 1998 will be reduced to the general Fund of the City of San Bernardino by approximately $1,600,000.00.

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[2] The City does not dispute the authenticity of these documents.

The City first contends that the determination of the amended tax ordinance's effective date is a question of law, to be determined by the court. Second, the City asserts that the City Clerk did not have authority to add an effective date to the copy of the amended tax ordinance on file in her office. Third, the City contends that the City Attorney's statement in his analysis of the amended tax ordinance as to the effect of a "No" vote on the City's expected revenue for next fiscal year does not relate to the effective date of the ordinance.

It is uncontroverted that the amended tax ordinance, as printed on the ballot, contained a provision regarding its effective date.

Courts interpret ordinances in the same way as they construe statutes. *Stolman v. City of Los Angeles*, 114 Cal App4th 916, 928 (2nd Dist 2003). Interpretation of an ordinance is a question of law *Id.*, *see also Southern Cal Edison Co v. Public Utilities Com*, 85 Cal App 4th 1086, 1096 (2nd Dist 2000).[3]

No evidence has been submitted by Plaintiffs that the voters intended that the effective date of the amended tax ordinance be other than that provided by state law.

The California Election Code provides that ordinances "fixing the amount of money to be raised by taxation or the rate of taxes to be levied" are effective immediately upon passage. Cal Elec Code §9141. Similarly, the California

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[3] Although Plaintiffs contend that the interpretation of the amended tax ordinance as to its effective date is a question of fact to be determined by a jury, they provide no precedential authority for this contention.

Government Code provides that a city ordinance takes effect immediately, if it is an ordinance "[r]elating to taxes for the usual and current expenses of the city." Cal Govt Code §36937. Therefore, the effective date of the amended tax ordinance approved by the voters is the date following the election February 4, 1998.[4]

The City Attorney's statement in his analysis on the ballot, regarding the effect of a "No" vote on the ordinance upon the City's expected revenue in the next fiscal year does not relate to the effective date of the amended tax ordinance. Although the statement calculates the monetary effect in relation to the fiscal year, beginning July 1, 1998, there is no implication that the ordinance only takes effect after that date. Likewise, the portion of the ordinance that states that the "Ordinance shall only take effect if approved by a majority of voters in an election held on or before June 30, 1998" does not imply anything regarding the effective date of the amended tax ordinance, but merely indicates that the election approving the ordinance must take place by a particular date.

Plaintiffs also contend that because the City Clerk's copy of the ordinance, to which voters had access before the election, contained an effective date of June 30, 1998 at the top of the first page, that date is the ordinance's effective date. When construing statutes and ordinances, requiring approval of the voters, the intent of the drafters may be considered by the court if there is reason to believe that the

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[4] Recognizing the City is a charter city, not a general law city, Plaintiffs have not presented any provision of the City's charter stating that the effective date of a City ordinance regarding taxation as different than the effective date established by state law for ordinances concerning taxation.

electorate was aware of that intent. *Rossi v. Brown*, 9 Cal 4th 688, 700 n 7 (1995).

Here, Plaintiffs assert that the copy of the ordinance that was available to the public, via the City Clerk's office, evinced a legislative intent that the amended tax ordinance become effective on June 30, 1998, and also constitutes evidence that the electorate was aware of such an intent. However, the uncontradicted evidence is to the contrary. The City Clerk's supplemental declaration, dated February 26, 2004, establishes that a staff member of her office erroneously typed the wrong effective date on the first page of the Clerk's copy of the amended tax ordinance available to the public. Neither the City Council nor the Mayor reviewed and approved the typed effective date. It appears from the supplemental declaration that there is a policy in the City Clerk's Office to type on the front page of each City Ordinance the "adopted date" and the "effective date." There is no evidence that the typed effective date on the Clerk's copy of the amended tax ordinance was a manifestation of legislative intent of the effective date of the ordinance. In addition, Plaintiffs fail to offer any evidence showing that members of the electorate reviewed the City Clerk's copy of the amended tax ordinance, or that they relied upon the effective date typed at the top of that copy.

For the reasons stated above, the Court rejects Plaintiffs' contentions that the effective date of the amended tax ordinance was June 30, 1998. Based on the uncontroverted facts, it concludes as a matter of law that the effective date of the amended tax ordinance was February 4, 1998, which was five days before the State Court of Appeal's decision was final on February 9, 1998 (The date the state appellate court's remttttttur was filed).

The Court further concludes as a matter of law based on the uncontroverted facts that Plaintiffs' time and effort in collecting Transient Lodging Taxes for the City during the period February 9, 2998 through June 30, 1998 were pursuant to a valid tax ordinance and the requirement that they do so was pursuant to a valid ordinance. Consequently, the City did not deprive Plaintiffs of their fourth and fifth amendment rights in violation of Section 1983 and did not take their property without justification in violation of Article 1, Section 19 of the California Constitution.

Accordingly, the court will grant City's motion for summary judgment.

IV.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT

Defendant City of San Bernardino's motion for summary judgment is GRANTED.

DATED September 24, 2004

/s/_____
Robert J. Timlin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55280

[Filed November 13, 2002]

PRAVIN D. PATEL; ARUNA P. PATEL; SANJAY PATEL; HARIVANDAN P. PATEL; HANSA PATEL; AMRUT N. PATEL; SITA PATEL; JAYESH PATEL; SURESH PATEL; MAHESH PATEL; BHAVABHAI PATEL; VIBHAKAR B. PATEL; MAHENDRA PATEL; VIMALABEN V. PATEL; MARKAN THAKAR; CHANDRAVADAN K.P. SHASTRI; PUSHPA C. SHASTRI; VIJAY K. SHASTRI; BHAGWATIBEN V. SHASTRI; RAJENDRA SHASTRI; ANITA SHASTRI,

Plaintiffs-Appellants,

v.

CITY OF SAN BERNARDINO, a Municipal Corporation,

Defendant-Appellee.

OPINION

BROWNING, Circuit Judge

Pravin D. Patel and twenty other named plaintiffs sued the city of San Bernardino, California for damages stemming from the city's enforcement of an unlawful tax. The district court dismissed the complaint for lack of jurisdiction. We affirm in part, reverse in part, and remand.

I.

The plaintiffs are owners and operators of hotels in the city of San Bernardino. The city imposed a "transient occupancy tax" on certain hotel guests, and the plaintiffs were required to collect this tax from their customers and remit it to the city. In 1991, the plaintiffs filed a complaint in state court for declaratory and injunctive relief under state law, asserting that the tax was unconstitutionally vague on its face. In 1997, the California Court of Appeal agreed and held that the tax violated the Due Process Clause of the federal constitution. *See City of San Bernardino Hotel/Motel Ass'n v. City of San Bernardino*, 59 Cal. App. 4th 237, 69 Cal.Rptr.2d 97, 101-04 (Cal. Ct. App. 1997). However, the court denied injunctive relief and noted that the city could amend the tax ordinance to cure its infirmities. 69 Cal.Rptr.2d at 104. That decision became final on February 9, 1998, shortly after the California Supreme Court denied discretionary review.

Meanwhile, the city passed an ordinance that replaced the old transient occupancy tax with a new "transient lodging tax." City voters approved that ordinance on February 3, 1998, but the new tax did not take effect until June 30, 1998. The city continued to collect the old tax during this

intervening period, even though the state courts had declared it unconstitutional.[1]

The plaintiffs then filed a complaint against the city in federal district court, claiming $1 million in damages under 42 U.S.C. § 1983 and state law. The district court dismissed the complaint for lack of jurisdiction under *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 70 L. Ed. 2d 271, 102 S. Ct. 177 (1981). The plaintiffs appeal.

II.

The Tax Injunction Act, 28 U.S.C. § 1341, provides that federal district courts may not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This statute prohibits both declaratory and injunctive relief in state tax disputes as long as the taxpayer has an adequate remedy in state court. *See California v. Grace Brethren Church*, 457 U.S. 393, 407-13, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (1982); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-99, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943).

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[1] The city asserts that the new tax actually took effect immediately on February 3 after being approved by the voters, so the city ended its collection of the old tax several days before the Court of Appeals decision became final. However, the city ordinance itself is not in the record. Because the plaintiffs are appealing the dismissal of their complaint under Fed. R. Civ. P. 12(b)(6), we accept as true their allegation that the city continued to assess the old tax for several months after the Court of Appeals decision became final. *See Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 772 (9th Cir. 2002)

In *Fair Assessment in Real Estate Ass'n v. McNary*, the Supreme Court extended the principles of comity and federalism underlying the Tax Injunction Act to prohibit an award of damages under § 1983. The Court recognized that federal courts generally must abstain from suits that would intrude into the administration of state taxation:

> Petitioners will not recover damages under § 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity.

454 U.S. at 113. Thus, taxpayers are barred "from asserting § 1983 actions against the validity of state tax systems in federal courts" as long as they had an adequate remedy available in state court. *Id.* at 116. *See also Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588-92, 132 L. Ed. 2d 509, 115 S. Ct. 2351 (1995) (holding that state courts cannot award declaratory or injunctive relief under § 1983 if the taxpayer has an adequate remedy under state law).

However, we are aware of no appellate case which reaches the narrow question here: whether a party who has obtained a declaration in state court that a tax is invalid may then obtain a remedy under § 1983 in federal court. We agree with the plaintiffs that *Fair Assessment* does not strictly control this case: the plaintiffs are not seeking to challenge the validity of a tax, but merely to obtain retrospective damages for a tax that has already been declared invalid in state court.

The city here does not defend the constitutionality of the challenged tax. Consequently, this suit is considerably less intrusive than the suit in *Fair Assessment*, where the federal court would have been required to determine the validity of the tax before awarding damages. *Cf. Fair Assessment*, 454 U.S. at 107 n.4 (leaving open the possibility that a § 1983 suit could proceed if it "requires no scrutiny whatever of state tax assessment practices").

In *Fair Assessment*, the Supreme Court was concerned that allowing actions under § 1983 would be particularly intrusive given the absence of any need to exhaust state remedies:

> The intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

454 U.S. at 113-14. That concern is not present here, where the plaintiffs first raised their claims in state court and successfully persuaded those courts that the tax was unconstitutional.

On the balance, however, we believe allowing damages would significantly intrude into the smooth functioning of the city's tax system. *See Tomaiolo v. Mallinoff*, 281 F.3d 1, 8 (1st Cir. 2002) (noting that although allowing a suit might be less disruptive because the city had stopped collecting the tax, "any such difference would not be so great as to justify recognizing an exception to *Fair Assessment*"); *see also Jerron West, Inc. v. Cal. State Bd. of Equalization*, 129 F.3d 1334, 1337 (9th Cir. 1997) (noting that the Tax Injunction

Act prohibits "even an indirect restraint on tax assessment"). Although the state courts declared the tax facially unconstitutional, they did not consider whether the plaintiffs had been injured. Before a federal court awarded damages, it would have to determine whether plaintiffs suffered cognizable injury and the extent of that injury.[2] Further, allowing damages under § 1983 could expose cities and states to substantial tort liability, such as the $1 million sought here, above and beyond any claim that the actual taxpayers have for a refund.

Allowing the plaintiffs to proceed would create a bypass around the broad prohibitions of *Fair Assessment* and *National Private Truck*. In *National Private Truck*, 515 U.S. at 585, 588-92, the Court held that the state courts could not award relief under § 1983, even though those courts had determined the tax was invalid under state law.[3] If the plaintiffs in this case were allowed to maintain their suit, they

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[2] The plaintiffs were not the actual taxpayers; they merely collected taxes from their hotel guests and remitted them to the city. At oral argument, plaintiffs stated they are not seeking a tax refund, but are instead seeking damages under a "theft of services" theory -- that the city required them to expend their time and effort to collect and account for an illegal tax. We assume, without deciding, that this presents a valid basis for damages under § 1983.

[3] Although the only question expressly addressed in the *National Private Truck* opinion was whether the plaintiffs could obtain equitable remedies under § 1983 in state court, its rationale applies with equal force to a claim for damages under § 1983. *See Gen. Motors Corp. v. City and County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal.Rptr.2d 544, 550 (Cal. Ct. App. 1999) ("While the high court has not *expressly* foreclosed the section 1983 action [for damages in state court] . . ., its interpretation of section 1983 compels the foreclosure.").

could accomplish through two suits -- a declaratory judgment action in state court and then a damages action in federal court -- what they could not do through a single action in state court for declaratory and monetary relief. Read together, *Fair Assessment* and *National Private Truck* bar use of § 1983 to litigate state tax disputes in either state or federal court. Given the "strong background principle against federal interference with state taxation," *Nat'l Private Truck*, 515 U.S. at 589, we will not carve out a new exception here, particularly one that would offend principles of comity by encouraging bifurcated litigation between state and federal courts. We hold that the plaintiffs may not proceed under § 1983 so long as a "plain, speedy and efficient" remedy is available in state court.

The "plain, speedy and efficient" exception to the Tax Injunction Act must be narrowly construed. *See Grace Brethren Church*, 457 U.S. at 413; *Ret. Fund Trust v. Franchise Tax Bd.*, 909 F.2d 1266, 1273 (9th Cir. 1990). In their state suit, plaintiffs only sought declaratory and injunctive relief, expressly disclaiming any entitlement to a tax refund. Further, unlike the present federal suit, the state suit did not pursue damages for a taking under state law. The state court gave them most of the relief they sought when it declared the tax invalid. This remedy, for the most part, was adequate.

The state court declined to award injunctive relief, however, and the city allegedly continued to collect the tax for several months after the decision invalidating the tax became final. To the extent that the city refused to follow the holding of the California Court of Appeal after its decision became final, the plaintiffs did not receive a "plain, speedy and efficient" remedy. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 516-17, 67 L. Ed. 2d 464, 101 S. Ct. 1221 (1981) (suggesting that "uncertainty concerning a State's

remedy may make it less than 'plain' under 28 U.S.C. § 1341") (citation omitted); *Ashton v. Cory*, 780 F.2d 816, 819 (9th Cir. 1986) (noting that a remedy is not plain "if there is uncertainty regarding its availability or effect"); *see also* John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73, 84 (1999) ("There is no dispute that once a state tax has been finally declared unconstitutional the state may not continue to collect the tax.").[4] Consequently, we reverse the district court's dismissal of the complaint in part and hold that the plaintiffs may pursue remedies under § 1983 for any damages that accrued after

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[4] Contrary to the dissent's assertion, our holding is based on the obvious inadequacy of the state remedy, not on whether a federal remedy is "better." A tax declared unconstitutional cannot continue to be collected. The state's remedy for the Due Process violation -- declaring the tax unconstitutional -- was uncertain and unclear in its effect since the city continued to collect the unconstitutional tax.

the state courts overturned the tax.[5] The parties shall bear their own costs.[6]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

DISSENT BY: Johnnie B. Rawlinson

DISSENT: RAWLINSON, Circuit Judge, Dissenting:

I respectfully dissent from that portion of the opinion concluding that the lack of injunctive relief in the state court proceeding resulted in an inadequate remedy. Our holding today is in disharmony with our ruling in *Ashton v. Cory*, 780

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[5] Plaintiff's ability to bring a § 1983 suit in state court is not a substitute for a plain and adequate state remedy. First, § 1983 provides federal relief, even if it may be awarded by a state court, and is not a state remedy. *Cf. Nat'l Private Truck*, 515 U.S. at 592 (holding that "state courts, like their federal counterparts, must refrain from granting federal relief under § 1983" when there is an adequate state remedy). Moreover, the Supreme Court has never held that a state court must entertain § 1983 cases; thus, a § 1983 claim in state court may only be a speculative remedy. *See Nat'l Private Truck*, 515 U.S. at 588 n.4. Finally, despite the availability of a § 1983 claim in state court as well as federal court, we must respect the plaintiffs' choice of federal forum when federal jurisdiction is available. *Zwickler v. Koota*, 389 U.S. 241, 248, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967) ("Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.").

[6] On remand, the district court should first consider whether to exercise supplemental jurisdiction over the plaintiffs' state law claim. If it does not, it should dismiss that claim without prejudice.

F.2d 816, 820 (9th Cir. 1986). In *Ashton,* we concluded that "for a state remedy to be adequate . . ., it need not be the best remedy available, nor need it even be equal to . . . that available in federal court." (citation omitted).

The majority acknowledges that the hotel owners prevailed on their claim that the transient occupancy tax violated the due process clause of the United States Constitution. Under the rationale of *Acton*, lack of the arguably better relief of an injunction did not render the state remedy inadequate for purposes of the Tax Injunction Act. Therefore, I would affirm the judgment of the district court.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

No. ED CV 98-0298 RT

[Filed January 25, 2001]

Pravin D. Patel, et al., Plaintiffs,	)
v.	)
City of San Bernardino, Defendant.	)

ORDER (1) GRANTING DEFENDANT'S MOTION TO DISMISS THE FIRST CLAIM OF THE FIRST AMENDED COMPLAINT ("FAC") PURSUANT TO FED.R.CIV.P 12(b)(6) AND (2) REMANDING THE REMAINING SUPPLEMENTAL STATE CLAIM OF THE FAC TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR SAN BERNARDINO COUNTY

The Court, the Honorable Robert J. Timlin, has read and considered Defendant City of San Bernardino ("the City")'s motion to dismiss Pravin D. Patel et al. ("Plaintiffs")'s first

amended complaint ("FAC") for insufficiency of process under Fed R.Civ.P. 12(b)(5) ("Rule 12(b)(5)") and for failure to state a claim under Fed.R.Civ.P. 12(b)(6) ("Rule 12(b)(6)") and, Plaintiffs' opposition thereto. Based on such consideration, the Court concludes as follows.

I

BACKGROUND

Plaintiffs have initiated the instant action against the City in the United States District Court for the Central District of California — Eastern Division by filing a complaint on November 10, 1998 alleging the following facts.[1] Plaintiffs did not serve the City with the complaint until March 31, 1999, more than 141 days after the complaint was filed. Plaintiffs are owners and operators of hotels and motels in the City.

In 1991, the City of San Bernardino Hotel/Motel Association ("Association"), initiated a lawsuit in the Superior Court for the State of California in the County of San Bernardino against the City challenging the City's Transit Occupancy Tax ("TOT"), San Bernardino Municipal Code ("SBMC") Chapter 3.52, then in effect. The case in the trial court was entitled *San Bernardino Hotel/Motel Association v. City of San Bernardino*, SCV 264661. The Association lost in the trial court, but successfully appealed certain issues in the California Court of Appeals. The Court of Appeal ruled that the TOT was unconstitutionally vague under the Due Process Clause of the Fifth and Fourteenth Amendments to

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[1] The alleged facts are deemed true for the purpose of determining whether Plaintiff has stated sufficient facts to allege a claim.

the United States Constitution. *City of San Bernardino Hotel/Motel Association v. City of San Bernardino*, 59 Cal App.4th 237 (4th Dist. Div. 2 1997).

The City then adopted a new Transit Lodging Tax ("TLT") to replace the TOT, and the voters of the City approved the new ordinance on February 3, 1998.[2] The instant suit for damages before the Court concerns the application of the former TOT by the City.

All the plaintiffs in the instant action are members of the Association and were members during the course of the prior litigation before the California courts.

Plaintiffs filed their FAC on May 10, 1999, setting forth two claims. First, City violated 42 U S.C. § 1983 (Section 1983) in that it deprived them of their Constitutional rights under the Fifth and Fourteenth Amendments to the U.S. Constitution by taking their property without a public purpose and engaging in a discriminatory policy and applying the City's law discriminatorily. Second, City is in violation of Article 1, Section 19 of the California Constitution by taking Plaintiffs' property without just compensation.

A. Timely Service of Summons and Complaint

The City contends that Plaintiffs' FAC should be dismissed because Plaintiffs did not serve the City with the

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[2] The Court notes that the City contends that the new ordinance became effective on February 3, 1998. Plaintiffs contend it did not become effective until June 30, 1998. The resolution of the instant motion does not necessitate the Court determining this conflict in dates.

summons and complaint until 141 days after they filed the complaint, and they have failed to demonstrate good cause for this failure. Fed.R.Civ.P. 4(m) ("Rule 4(m)") requires that courts extend the time for service of process if plaintiff demonstrates good cause for failure to serve the summons and complaint within 120 days.[3] A plaintiff bears the burden of demonstrating the existence of good cause. *Wei v. State of Hawaii*, 763 F.2d 370, 371 (9th Cir. 1985). In the absence of good cause, the Court has discretion to extend the time for service of process. *De Tie v. Orange County*, 152 F.3d 1109, 1111 n5 (9th Cir 1998).

Plaintiff argues that Weiser's health problems constituted good cause or "excusable neglect." Weiser states in a declaration, dated May 20, 1999:

> I am a solopractitioner (sic) and because of the backlog in my office, due to my health problems, which includes a heavy trial and appellate calendar, I made the mistake and miscalendered the matter and forgot to serve the summons and complaint within the 120 day period.

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[3] Fed.R.Civ.P. 4(m) provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the Court . . shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the Court shall extend the time period for service for an appropriate period.

Fed R.Civ.P. 4(m) (1993).

Inadvertence of counsel does not constitute good cause. *See Wei,* 763 F.2d at 372. However, poor health of counsel may. *See Matasareanu v. Williams*, 183 F.R.D. 242, 246 (C.D. Cal. 1998) ("Ill health, however, may constitute good cause; but, additional information from plaintiff about her ill health, and its incapacitating nature, would be required to show good cause.") *See also LeMaster v. City of Winnemucca*, 113 F.R.D. 37, 39 (D.Nev.1986) (holding plaintiffs counsel's illness constitutes good cause "when the illness is so physically and mentally disabling that counsel is unable to file").

Weiser presents evidence of his health problems.[4] Weighing in favor of finding good cause is that Weiser is a

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[4] Weiser in his declaration states:

> I suffer from Chrone's disease, an inflammatory bowel illness which has a tendency to flare up intermittently, and that was exacerbated by a death in my wife's family.
>
> In the last five months my illness has been particularly troubling due to a related endocutaneous fistula condition that required my seeking emergency medical care at Cedars-Sinai Medical Center on Thanksgiving.
>
> The condition has caused me to be intermittently bedridden and I have lost a good deal of time from my practice.

Letters from Sherman, Weiser's doctor, dated January 15, 1999 and February 9, 1999 confirm that Weiser suffers from "Crohns" disease and a related Fistula condition which has exacerbated itself over the last several months. Sherman further explains: "The condition is quite debilitating causing the patient to be unable to stand or sit for sustained periods of time and requiring bedrest."

sole practitioner and that there is no indication of prejudice or injury to the City in being served with the summons and complaint 21 days after the expiration of the time period allowed for such service. However, Weiser does not state that he was so incapacitated that he was unable to serve the City. Nor does he assert that his health problems created an office backlog which prevented him from serving the City. Rather, Weiser states that his health problems caused him to "miscalendar" the matter. Although Weiser submitted evidence of his health problems, his argument as to good cause resembles inadvertence more than it does incapacitating health problems. The Court also notes that Plaintiffs did not have to spend time locating the City for service as Plaintiff had already served the City in the prior state case. Therefore, the Court finds Plaintiffs have failed to demonstrate good cause for their failure to serve the City within 120 days.

However, the Court will extend the time for service as permitted under Rule 4(m). The Notes from the Advisory Committee on the Federal Rules suggest that granting such an extension may be justified if the applicable statute of limitations would bar the action from being refiled. *See* Fed.R.Civ.P. 4(m) advisory committee's note.

California's one-year statute of limitations for personal injury actions applies to Plaintiffs' section 1983 claim. *See Taylor v. Regents of University of California*, 993 F.2d 710, 711 (9th Cir. 1993) (citation omitted).[5] It is evident that a refiled action would be barred. The TLT became effective on June 30, 1998 at the latest. Even if Plaintiffs were able to

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[5] Plaintiffs argue that they were precluded from bringing the instant action until the California courts had an opportunity to rule on the constitutionality of the TOT ordinance.

show their injuries and entitlement to just compensation continued until the TOT was repealed and the TLT became effective, the latest possible date they could have filed would be June 30, 1999.[6] Because Plaintiffs' would be barred from refiling their complaint, the Court will extend the time for service of the summons and complaint to the date they were actually served on the City. Accordingly, Defendant's motion to dismiss for untimely service of process will be denied.

B. Plaintiffs' Section 1983 Claim

The City argues that Plaintiffs' Section 1983 claim should be barred under the principles of res judicata and collateral estoppel. "Res judicata bars 'not only the reopening of the original controversy, but also subsequent litigation of all issues that were or could have been raised in the original suit.'" *Torrey Pines Bank v. Superior Court*, 216 Cal.App.3d 813, 821, 265 Cal.Rptr. 217 (1989), quoting *Gates v. Superior Court*, 178 Cal.App.3d 301, 311, 223 Cal.Rptr. 678 (1986). Collateral estoppel bars claims that could have been brought, but were not, in a former proceeding. *Migra v. Warren City School District*, 465 U.S. 75, 77 n.1, 104 S.Ct. 892 (1984). Plaintiffs counter that they were precluded from bringing their section 1983 claim until after the state court held the TOT unconstitutional.

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[6] The Court has jurisdiction over Plaintiffs' California Constitutional claim pursuant to supplemental jurisdiction under 28 U.S.C. § 1367. Because, as will be discussed below, the Court will dismiss Plaintiffs' section 1983 claim and remand Plaintiffs' remaining state claim, the Court need not discuss the applicability of the statute of limitations for the California Constitutional claim.

Pursuant to the Federal Tax Injunction Act, 28 U.S.C. §1341 ("section 1341"),[7] and principles of comity and federalism, federal courts have been reluctant to review state tax statutes. The passage of section 1341 was intended by Congress to "limit drastically federal court jurisdiction to interfere with so important a local concern as the collection of taxes," *Rosewell v LaSalle National Bank*, 450 U.S 503, 522, 101 S.Ct. 1221 (1981) (citations omitted). The Supreme Court has reiterated this important proposition on numerous occasions and has relied on section 1341, as well the principles of comity and federalism, to deny federal review of state tax laws. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n et al*, 515 U.S. 582, 586 115 S.Ct 2351 (1995) ("We have long recognized the principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *see also Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070 (1943) (relying on comity to deny federal jurisdiction to issue declaratory relief as to the constitutionality of state tax laws); *Rosewell*, 450 U.S. 503 (holding federal jurisdiction to grant injunctive relief regarding state tax assessment barred by section 1341)

> The Supreme Court explained in *Fair Assessment in Real Estate Assn., Inc. v. McNary*:
>
> The reason for this guiding principle [of equitable restraint] is of peculiar force in cases where the suit, like

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[7] Section 1341 provides "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

> the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.

454 U.S. 100, 108, 102 S.Ct. 177 (1981).

The Court in *Fair Assessment*, based on the principle of comity, held that actions in federal courts for damages pursuant to section 1983 were barred as long as an adequate state remedy existed. *See id.* at 116. "Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Id.* The Court reasoned that an award of damages under section 1983, as with any section 1983 action, would require an initial declaration by the federal court that the administration of the state tax violated plaintiffs' constitutional rights. Thus, in effect, requiring a declaratory judgment similar to the one barred by the Court in *Great Lakes* which would be just "as intrusive as the equitable actions barred by principles of comity." *Id.* at 113. The Court clarified in *National Private Truck Council* that the bar to injunctive relief and damage awards under section 1983 applies regardless of whether the suit is brought in federal or state court. *See National Private Truck Council*, 515 U.S. at 589-590.

Thus, Plaintiffs correctly argue they were required to proceed in state court to invalidate the TOT. Under the precedents discussed above, this Court would not have had

jurisdiction to review the constitutionality of that tax ordinance. However, it does not follow that this Court acquired jurisdiction *after* the state court invalidated the ordinance. The Supreme Court cases addressing the bar on federal court review of state tax law do not speak in terms of timing; the bar on lower federal courts review of state tax statutes is an absolute bar as long as there is an adequate state law remedy. "[Federal courts] may not award damages or declaratory or injunctive relief in state tax cases when an adequate state remedy exists." *National Private Truck Council*, 515 U.S. at 588 (citing *Fair Assessment*, 454 U.S. at 116). Therefore, as long as there is an adequate state law remedy, Plaintiffs are precluded from obtaining remedies pursuant to §1983.

Plaintiffs argue that there is no adequate state law remedy available to them, and thus their section 1983 claim should not be barred. A state law remedy is adequate if it is "plain, speedy and efficient," which the Supreme Court has interpreted as "[meeting] certain minimal procedural criteria" *California et al. v. Grace Brethren Church et al.*, 457 U.S. 393, 411, 102 S.Ct. 2498 (1982) (citing *Rosewell*, 450 U.S. at 512). A state remedy meets this standard if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Grace Brethren Church*, 457 U.S. at 411 (citing *Rosewell*, 450 U.S. at 514). Procedures requiring taxpayers to pay an allegedly unconstitutional tax and then seek a refund through state administrative and judicial procedures have been upheld under this standard. *See Rosewell*, 450 U.S. at 512-513, *see also Grace Brethren Church*, 457 U.S. at 417.

The City's former TOT provided for refunds and if the operator is aggrieved by the City Clerk's decision on the claim, it may appeal the decision to the City's council.

Section 3 52.120, SBMC.[8] Plaintiffs do not contest that the ordinance provided for refunds in general, but they argue the

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[8] Section 3 52.120 of the former TOT provided:

> A. Whenever the amount of tax or penalty has been overpaid or paid more than once or has been erroneously or illegally collected or received by the City under this chapter, it may be refunded as provided in subsections B and C of this section provided a claim in writing therefor, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the City clerk within three years of the date of payment. The claim shall be on forms furnished by the City Clerk.
>
> B. An operator may claim a refund or take credit against taxes collected and remit the amount overpaid, paid more than once or erroneously or illegally collected or received when it is established in a manner prescribed by the City Clerk that the person from whom the tax has been collected was not a transient, provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the transient or credited to rent subsequently payable by the transient to the operator.
>
> C. A transient may obtain a refund of taxes overpaid or paid more than once or erroneously or illegally collected or received by the City by filing a claim in the manner provided in subsection A of this section, but only when the tax was paid by the transient directly to the City Clerk, or when the transient, having paid the tax to the operator, establishes to the satisfaction of the City Clerk that the transient has been unable to collect a refund from the operator who collected the tax.

The Ordinance defines operator as "the person who is proprietor [sic] of the hotel." Section 3.52.020(C).

refund procedures were inadequate as applied to them. They argue that they are not personally compensated by any refund or credit on their taxes because such a refund or credit must be "refunded to the transient or credited to rent subsequently payable by the transient to the operator."

From the language of the ordinance, it does not appear to the Court that any person or entity who paid an "erroneous or illegal" tax would be denied a refund. The refund procedures of the Ordinance directing that refunds collected by an operator on behalf of a transient be "refunded to the transient or credited to rent subsequently payable by the transient to the operator" ensure that the person or entity who paid the "erroneously or illegally collected" tax will receive the refund directly. The procedures, as a whole, provided a "plain, speedy and efficient" remedy to any party or entity who paid a tax under the ordinance. Plaintiffs are not denied an adequate legal remedy if they are not able to collect a refund for taxes they did not directly pay. As evidenced by the prior state action, Plaintiff's were entitled to a judicial hearing at which they were able to raise their constitutional objections. In fact, the court ruled in their favor and invalidated the TOT.

The Ninth Circuit has rejected an argument similar to the one raised by Plaintiffs. *See Ashton v. Cory*, 780 F.2d 816, 819-820 (9th Cir. 1986). The plaintiff in *Ashton* argued "it has no plain remedy under California law, since it is not the party from whom the tax is due, and may therefore pay the levy and be ineligible for a refund." The Ninth Circuit dismissed this argument because the plaintiff had an opportunity in state proceedings to contest the tax assessed. *See id.* Here, as noted above, Plaintiff had an opportunity to contest the assessed tax in state proceedings. Therefore, an adequate state law remedy was available to Plaintiffs, thus

barring their section 1983 claim for damages. Accordingly, Plaintiffs' section 1983 claim will be dismissed.

C. Remand of Remaining State Claim

This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 & 1367. However, since Plaintiffs' sole federal claim under Section 1983 claim will be dismissed this Court no longer has original subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs' remaining claim is based on state law. The court has discretion to decline to exercise supplemental jurisdiction over a state claim pursuant to 28 U.S.C. § 1367(c), which provides:

> (c) The district court may decline to exercise supplemental jurisdiction over
> a claim .. if-
>
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has distressed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Here, the Court will exercise its discretion and decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3) over the second claim of the FAC for violation of the California Constitution, Article I, Section 19. Thus, this Court will remand Plaintiffs' remaining California constitutional claim to the Superior Court of California in and for the County of San Bernardino.

IV

DISPOSITION

IT IS ORDERED THAT:

(1) The City's motion to dismiss based on untimely service of the summons and complaint pursuant to Rule 12(b)(5) is DENIED;

(2) The City's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is GRANTED with prejudice as to Plaintiffs' Section 1983 claim;

(3) Plaintiffs' California Constitutional claim is REMANDED to the Superior Court of the State of California in and for the County of San Bernardino.

DATED: January 25, 2001

/s/
ROBERT J TIMLIN
United States District Judge